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No. 83-771

IN THE

Supreme Court of the United States

October Term, 1983

OHIO SEALY MATTRESS MFG. CO., ET AL.,

Petitioners,

v.

SEALY, INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner seeks review of a decision of the court of appeals holding that that court had no appellate jurisdiction of an appeal from an interlocutory order of the district court refusing to order immediate arbitration of certain contractual issues tangential to a private antitrust action. The district court's order was grounded on the view that the issues tendered for arbitration were permeated by nonarbitrable antitrust issues pending before the court on plaintiff's own motion for partial summary judgment, and that belated interruption of the case for arbitration of subordinate issues would unnecessarily delay disposition of an already protracted antitrust case. (A10-11.)[1]

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1. References to A__ are to the Appendix to the Petition.

REASONS FOR DENYING THE WRIT

The sole question presented by the petition is the appealability of an interlocutory order of a district court regulating the order of proceedings in a complex case. The decision of the court below declining jurisdiction was based on familiar principles restricting interlocutory appeals. There is no conflict with any decision of another court of appeals or with any decision of this Court, and petitioner makes no contention that there is. If any need could be urged for new doctrine increasing the burden of interlocutory appeals on the federal court system, this case is certainly not an example.

The case in no way resembles *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, ___ U.S. ___, 103 S. Ct. 927 (1983), in which the Court held (103 S. Ct. at 933-35) that a district court's "stay" based on abstention from the exercise of federal jurisdiction amounted to "dismissal of the suit" and was therefore a final order (and, alternatively, was appealable under the collateral-order doctrine). The sole claim in that case was plaintiff's claim for an order compelling arbitration; the district court's order effectively terminated the entire lawsuit and hence was appealable.

The order in the present case was not a final order in any sense. The arbitration request related only to certain contract claims associated with a multi-count, multiple-claim antitrust case pending since 1979, which could not be resolved by any determination of the contract issues. The district court's order did not either decline to entertain the arbitration request nor finally determine it; the order merely deferred any arbitration to which plaintiff might be entitled, as the court of appeals expressly noted (A3). Nor could the order qualify for appealability under the collateral-order exception,

since it neither "conclusively determine[d] the disputed question" nor rendered any question "effectively unreviewable on appeal from a final judgment." *Cone Memorial Hospital* v. *Mercury Construction Corp.*, *supra*, 103 S. Ct. at 935.

Equally clearly, the order was not an appealable interlocutory order under 28 U.S.C. § 1292(a)(1). It neither granted nor refused an injunction. It neither granted nor refused a stay of judicial proceedings.[2] Even had a stay been requested and refused, the order would not qualify for appealability under the so-called Enelow-Ettelson doctrine, since it would not involve the staying of an equitable defense in an action at law. As stated in a case directly in point, *Turkish State Railways Admin.* v. *Vulcan Iron Works*, 230 F.2d 108, 110 (3d Cir. 1956) (per Maris, J.):

> There was here not even the shadow of a chancellor being asked to stay an action at law nor any semblance of a stay being sought against anyone but the plaintiff. Moreover to suggest that a plaintiff may invoke a chancellor's aid to enjoin himself from prosecuting his own lawsuit is indeed novel doctrine, too unrealistic for serious consideration.

See also Goodall-Sanford, Inc. v. *United Textile Workers*, 233 F.2d 104, 106 (1st Cir. 1956), *aff'd*, 353 U.S. 550 (1957).

Understandably, the court of appeals declined to invoke its mandamus powers to interfere with the district court's management of the case and add further delay in this extraordinary antitrust litigation, which is already a monument to litigious entrepreneurship and procedural ingenu-

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2. Petitioner's motion was not a motion for a stay. *See* Magistrate's Report, at A15.

ity.[3] As the Magistrate's report (A13-19) suggests, the proliferation of arbitration demands by the plaintiff during the course of this litigation, far from expediting the resolution of disputes, would convert an arbitration clause into an instrument whereby a lawsuit becomes "uncharted and unending" (A18). *Cf. Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, No. 83-547, certiorari denied, November 28, 1983.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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3. For a partial indication of the judicial time thus far occupied by the litigation of which the instant Petition is a part, see *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, 669 F.2d 490 (7th Cir.), *cert. denied*, ___ U.S. ___, 103 S. Ct. 257 (1982); *Ohio-Sealy Mattress Mfg. Co.* v. *Kaplan*, 545 F.Supp. 765 (N.D. Ill. 1982), *aff'd*, 712 F.2d 270 (7th Cir. 1983), *cert. denied*, ___ U.S. ___ (No. 83-547 Nov. 28, 1983); *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, 585 F.2d 821 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979); *Ohio-Sealy Mattress Mfg. Co.* v. *Duncan*, 486 F.Supp. 1047 (N.D. Ill. 1980); *Ohio-Sealy Mattress Mfg. Co.* v. *Duncan*, 95 F.R.D. 89 (N.D. Ill. 1982); *Ohio-Sealy Mattress Mfg. Co.* v. *Kaplan*, 90 F.R.D. 45 (N.D. Ill. 1981); *Ohio-Sealy Mattress Mfg. Co.* v. *Kaplan*, 90 F.R.D. 40 (N.D. Ill. 1981); *Ohio-Sealy Mattress Mfg. Co.* v. *Kaplan*, 90 F.R.D. 35 (N.D. Ill. 1981); *Ohio-Sealy Mattress Mfg. Co.* v. *Kaplan*, 90 F.R.D. 21 (N.D. Ill. 1980); *Ohio-Sealy Mattress Mfg. Co.* v. *Kaplan*, 90 F.R.D. 11 (N.D. Ill. 1980).